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INFORMATION

F O R

Sir William Maxwel of Murreith;

A G A I N S T

Andrew Houston and other Creditors of
Sir Godfrey M'culloch.

SIR *William Maxwel of Murreith* having Purchased the Lands of *Ardwel* and *Kilaster*, belonging to *Sir Godfrey M'culloch*, and the Creditors insisting to be ranked, and that *Sir William* as Purchaser may be discerned to pay them the price according to their preferrences, he alledges he cannot be lyable to pay the price till he receive a progress for securing his Purchase, which is a common defence competent to all Purchasers.

It is Answered, That the sale of Bankrupts Lands being introduced by Law for the benefite and advantage of Creditors, it was designed and expressly statute by that Law, that the price should be divided and distribute amongst the Creditors, according to their severall Rights and preferrences, and purchasers knowing the Law, and offering a price, ought to be satisfied of their security before they make their offer, and it cannot be supposed that Creditors can be Masters of their Debtors Charter Chift. 2do. *Sir William* is a near Relation to the debtor, and is presumed to have more influence on him than the Creditors, and having offered a price, and extracted a Decreet of Sale, he hath taken his hazard. And lastly, it is against reason, that a purchaser should enter to the Possession, and keep up the price to the prejudice of the Creditors.

To all which it was replied, That no purchaser is bound to pay a price without the Rights and securities of his Purchase. And the Statute annent Bankrupts hath made no alteration in our Law as to that point: For the Acts annent Sales do not provide that Purchasers at a Roup shall have an absolute security against all deadly; So as no Right of any third party can exclude such a Purchaser, on the contrair nothing is exposed to sale, but the Bankrupts Right, & payment conform to the Decreet of preference doth only secure against the Bankrupts Creditors; But the Purchaser paying the full price, is not secure against any third party; And therefore it is most reasonable that he should see the Rights, establishing the Estate exposed to Roup in the person of the Bankrupt, as the foundation and security of his Purchase.

And whereas it is alledged, That the Act provides that the price offered shall be distribute amongst the Bankrupts Creditors, that it still upon the preceeding supposition in the same Act, that the Estate exposed to sale did belong to the Bankrupts, which must be instructed.

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(2)

And, whereas it is further alledged, that *Sir William* having extracted a Decreet of Sale, he hath taken his hazard, and that he is a near Relation.

It is Answered. *1mo.* That the Extracting of the Decreet of Sale upon a Roup, is no more than the accepting of a Disposition in a voluntar sale, which doth not hinder the Receiver to require a progress, because that it is implied in sale. *2do.* A Purchasser at a Roup is presumed to know no more than he can learn by the Letters of publication and Intimation, and he hath no access or opportunity to see Writes, and therefore must rely upon the security which all Purchassers have, that a progress must be delivered, else no Man in his right Wits would offer without seeing a progress consigned in the Clerks hand, which was never practised, nor is it practicable. For Suppose a Charter Chift were in the Clerks hands, the Lords would not allow Strangers to have access, whose design might be to pry into the Defects of the Progress; and in this particular Case, a great part of the Debtors Estate was a Right contraverted, all the time of the Debitor and his Fathers Lifetimes, and the equal half of *Sir Williams* Purchase, was only acquired by *Sir Godfrey's* Father.

The Lords are so far from allowing the Viewing of Charter-Chifts before the Purchase, that by Act of Sederunt, the Inventars to be delivered to the Purchasser, are not allowed to be exposed to View, least Defects might be discovered.

It would be most inconvenient, if Purchassers were obliged to see the Writes; For *1mo.* No Sale could proceed till the Writes were in the Clerks hands. *2do.* When the Writes are in the Clerks hands, it would be perfectly known who were to offer at the Sale, whereby there would be great packing to the prejudice of the Creditors; Whereas by the constant practice, Creditors do not know or enquire any thing about the Rights, but come to offer upon Supposition that a Progress will be delivered, and Experience hath taught that the price rises very high at Roups, which would become wholly ineffectual, if such preparation were necessary, to discover all parties designing to offer, and many will offer upon the assurance of a progress, that would not be at the pains to enquire about it, when they are uncertain whether they will be preferred or not.

All the Grounds foresaid are pled on the general point, But *Sir William* is in a special Case, for he made his Objections before he extracted his Decreet of Sale, and did represent his difficulty to the Lords by a Bill, and the Lords did reserve the point to be determined in the Rank, as the Bill and Deliverance ingroft in the Decreet of Sale, do make appear.

And as to *Sir Williams* Relation, It signifies nothing, for his purchassing and possessing the Debtors Estate doth dissolve all that Tye, and disoblige more than a far nearer Relation could cement.

And lastly, As to the Inconvenience that a Purchasser should possess, and not be obliged to pay.

It is answered, *1mo.* The Purchasser will not, nor can he justly refuse to pay the Annualrent, which is answerable to his possession. *2do.* It cannot be supposed that any Purchasser, who is able to find Caution or hath a stock, will desire to retain the price, and pay Annualrents, if he could be secure, because the Annualrent will alwise be a 6th part more then the neat Rent, so that the Purchasser will be a yearly Loser, to which no reasonable Man would willingly oblige himself, whereas on the other hand the Creditors lose nothing that they could have had, but they gain much by being free of Chamberlain

(3)

Chamberlain Accompts and Fees. 3thio. Few Cases occur wherein there is cause to complain than in this, for the Sir William hath not, nor can he safely, yet he hath Lodged his money in the most of the preferable Creditors hands, whereby if the Ranking were concluded and the Writes deferred, he would have no more to do but apply Compensation, which at present, he is not safe to do.

It was farther alledged for the Creditors, That the Purchaser paying, obtains absolute warrandice from every Creditor to whom he payes, so that in case of Eviction, he could have Recourse upon the Warrandice.

It is Answered, 1^{mo}. That the Extent of Creditors Warrandice is not yet determined by Law or practice, whither the same doth import Warrandice only against Co-creditors, or if it Imports an obliment to warrand the Debtors Right in favours of the Purchaser? 2^{do}. Suppose the warrandice did import an obliment to warrand the Right, yet the Creditors warrandice is divided, every man for his own hand; And suppose there were a partial eviction, it is like, the Lords would not find that every Creditor were lyable conjunctly and severally in so far as they received; For the preferable Creditors would alledge, that there remained sufficient fond to pay them, and thereby the Purchaser would be at no small trouble to find out on whom his Warrandice should ludge. And suppose there were a total eviction, yet the purchaser hath not only the inconveniencie that his action is divided amongst many Creditors, whereof it may be the one half or more, may be dead or broken, upon which no man can rely. And lastly in all sales the Purchaser ought not only to have warrandice, but writes, and tho sufficient warrandice were offered, as it is evident there is no valuable warrandice to be expected; Yet *Tutius est incumbere rei quam personæ*; And therefore Law and custom hath provided purchasers to be secured by a progress, that they may have the means to preserve their possession, which is preferable to the best Warrandice.

In Respect whereof, &c.

Handwritten notes and signatures in the bottom right corner, including the name "John" and various initials and flourishes.

Informations for
 Sir William Mapes
 of Monroth
 clgd
 Thadene of Boufflone
 is also called Boas
 of St. George Milled
 1696